

STATE OF INDIANA) SS: BEFORE THE INDIANA DEPARTMENT OF
) ENVIRONMENTAL MANAGEMENT
COUNTY OF MARION)
)
COMMISSIONER OF THE DEPARTMENT)
OF ENVIRONMENTAL MANAGEMENT)
)
)
 Complainant,)
)
 v. Case No. 2008-18245-W
)
SHELBY COUNTY COMMISSIONERS,)
)
 Respondents.)

Complainant and Respondents desire to settle and compromise this action without hearing or adjudication of any issue of fact or law, and consent to the entry of the following Findings of Fact and Order. Pursuant to IC 13-30-3-3, entry into the terms of this Agreed Order does not constitute an admission of any violation contained herein. The Respondents' entry into this Agreed Order shall not constitute a waiver of any defense, legal or equitable, which Respondents may have in any future administrative or judicial proceeding, except a proceeding to enforce this Order.

1. Complainant is the Commissioner (“Complainant”) of the Indiana Department of Environmental Management (“IDEM”), a department of the State of Indiana created by Indiana Code (“IC”) 13-13-1-1.
2. Respondents are the Shelby County Commissioners (“Respondents”). Volunteers acting on behalf of Respondents cleared a log jam area of the Big Blue River, and conducted other clearing, excavation, and filling in the area located starting at County Road 425 North and proceeding upstream approximately 3,500 feet, at Section 8, Township 13 North, Range 7 East, in Shelby County, Indiana (“Site”).

3. IDEM has jurisdiction over the parties and the subject matter of this action.
4. Respondents waive issuance of a Notice of Violation and to the settlement period of sixty days as provided for by IC 13-30-3-3.
5. On August 11, 2008, Respondents obtained authorization from the Indiana Department of Natural Resources ("IDNR") to clear the above referenced log jam area under Title 312 Natural Resources Commission, Emergency Rule, LSA Document #08-443(E), adopted by IDNR on June 11, 2008 ("Emergency Rule").
6. Pursuant to 33 U.S.C. 1341 Section 401, unauthorized mechanical clearing, excavation, and filling of waters of the United States and Waters of the State is prohibited.

During inspections conducted at the Site on September 18, 2008, and September 24, 2008, IDEM staff observed that Respondents had reopened approximately 3,500 feet of the channel of the Big Blue River. In the course of removing the log jam and sediment that had accumulated therein, Respondents had side-cast material into multiple overflow channels of the Big Blue River as well as approximately 3,500 feet of bank area above the Ordinary High Water mark ("OHW") along either side of the Big Blue River. The multiple overflow channels had been filled, temporarily restricting the flow through the side channel and wooded areas adjacent to the natural channel. Over the years that the log jam had developed, the stream had cut new flow paths through the wooded area transporting sediment downstream. The exit channels that had been cut from the original channel into the adjacent wooded areas constitute waters of the United States and Waters of the State of Indiana. Therefore the mechanical clearing, excavation, and filling of Waters of the United States and Waters of the State in these exit channels, without issuance of Section 401 Water Quality Certification, was in violation of 33 U.S.C. 1341 Section 401.

7. Pursuant to 327 IAC 5-2-2, any discharge of pollutants into Waters of the State as a point source discharge, except for exclusions made in 327 IAC 5-2-4, is prohibited unless in conformity with a valid NPDES permit obtained prior to the discharge.

Pursuant to IC 13-18-4-5, it is unlawful for any person to throw, run, drain, or otherwise dispose into any of the streams or waters of this state, or to cause, permit, or suffer to be thrown, run, drained, allowed to seep, or otherwise disposed into any waters, any organic or inorganic matter that shall cause or contribute to a polluted condition of any waters according to any rule of the board under section 7 of this chapter.

Pursuant to IC 13-30-2-1, it is unlawful for any person to discharge, emit, cause, or allow any contaminant or waste, including any noxious odor, either alone or in combination with contaminants from other sources in the environment in any form that causes or would cause pollution that violates or would violate rules, standards, or discharge or emission requirements adopted by the appropriate board under the environmental management laws.

During inspections conducted at the Site on September 18, 2008, and September 24, 2008, IDEM staff observed that Respondents allowed sediment to enter the Big Blue River, a Water of the State, and had placed sediment in the adjacent channels at the Site, without being in conformity

with a valid NPDES permit obtained prior to the discharge. Notwithstanding that the discharge of sediment into the Big Blue River system was inherent with the logjam removal project, the sedimentation that was generated as an immediate result of the project occurred without a permit, in violation of 327 IAC 5-2-2, and therefore violated IC 13-18-4-5, and IC 13-30-2-1.

8. Pursuant to 327 IAC 2-1-6(a)(1), all surface waters at all times and at all places, including the mixing zone, shall meet the minimum conditions of being free from substances, materials, floating debris, oil or scum attributable to municipal, industrial, agricultural, and other land use practices or other discharges that will settle to form putrescent or otherwise objectionable deposits, that are in amounts sufficient to be unsightly or deleterious, that produce color, odor or other conditions in such degree as to create a nuisance, which are in amounts sufficient to be acutely toxic to, or to otherwise severely injure or kill aquatic life, other animals, plants, or humans.

Pursuant to 327 IAC 2-1-2(1), the following policy of non-degradation is applicable to all surface waters of the state: For all waters of the state, existing beneficial uses shall be maintained and protected. No degradation of water quality shall be permitted which would interfere with or become injurious to existing and potential uses.

During inspections conducted at the Site on September 18, 2008, and September 24, 2008, as already described in Paragraphs 6 and 7 above, IDEM staff observed that Respondents' activities had caused violations of 327 IAC 2-1-6(a)(1) and 327 IAC 2-1-2(1).

9. Pursuant to 327 IAC 15-2-5(a), any person subject to the requirements of 327 IAC 15 shall submit a notice of intent ("NOI") letter that complies with 327 IAC 15-2-5, 327 IAC 15-3, and the additional requirements in the applicable general permit rule.

Pursuant to 327 IAC 15-5-2(a), the requirements under this rule apply to all persons who:

- (1) do not obtain an individual NPDES permit under 327 IAC 15-2-6;
- (2) meet the general permit rule applicability requirements under 327 IAC 15-2-3; and
- (3) are involved in construction activity, except operations that result in the land disturbance of less than one (1) acre of total land area as determined under subsection (h) and are not part of a larger common plan of development or sale.

Pursuant to 327 IAC 15-5-4(30), "project site owner" means the person required to submit the NOI letter under this article and required to comply with the terms of this rule, including either of the following:

- (1) A developer.
- (2) A person who has financial and operational control of construction activities and project plans and specifications, including the ability to make modifications to those plans and specifications.

Pursuant to 327 IAC 15-5-2(d), the project site owner has the following responsibilities:

- (1) Complete a sufficient notice of intent letter.
- (2) Ensure that a sufficient construction plan is completed and submitted in accordance with 327 IAC 15-5-6;

- (3) Ensure compliance with 327 IAC 15-5 during:
 - (A) the construction activity; and
 - (B) implementation of the construction plan.
- (4) Notify the department with a sufficient notice of termination letter.
- (5) Ensure that all persons engaging in construction activities on a permitted project site comply with the applicable requirements of 327 IAC 15-5 and the approved construction plan.

Pursuant to 327 IAC 15-5-5, the information set forth in 327 IAC 15-5-5 must be submitted by the project site owner with a complete NOI letter under this rule, including a notification from the SWCD or other entity designated by the department as the reviewing agency indicating that the construction plans are sufficient to comply with this rule.

Pursuant to 327 IAC 15-5-6(a), after the project site owner has received notification from the reviewing agency that the construction plans meet the requirements of the rule or the review period outlined in subsection (b)(3) has expired, all NOI letter information required under 327 IAC 15-5-5 shall be submitted to the commissioner at least forty-eight (48) hours prior to the initiation of land disturbing activities at the site.

Based on inspections conducted by IDEM staff on September 18, 2008, and September 24, 2008, and a record review, Respondents disturbed more than one acre, failed to submit an NOI letter to IDEM prior to initiating land disturbing activities at the Site, failed to ensure that a sufficient construction plan was completed and submitted in accordance with 327 IAC 15-5-6, and failed to ensure compliance with 327 IAC 15-5 during the construction activity, in violation of 327 IAC 15-2-5, 327 IAC 15-5-2, 327 IAC 15-5-5, and 327 IAC 15-2-6.

- 10. Pursuant to 327 IAC 15-5-6.5(a), for project sites that do not meet the criteria in 327 IAC 15-5-6.5(b), the project site owner shall develop a set of construction plans. Storm water quality measures included in the plan must achieve the minimum project site requirements specified in 327 IAC 15-5-7, and must include the information set forth in 327 IAC 15-5-6.5(a).

Pursuant to 327 IAC 15-5-6(b)(1), for a project site where the proposed land disturbance is one (1) acre or more as determined under 327 IAC 15-5-2, a construction plan must be submitted prior to the initiation of any land disturbing activities, and sent to the appropriate SWCD or other entity designated by IDEM for review.

Respondents failed to submit a construction plan for the Site prior to initiating land disturbing activities, in violation of 327 IAC 15-5-2(d), 327 IAC 15-5-6.5(a) and 327 IAC 15-5-6(b).

During the inspections conducted by IDEM staff on at the Site on September 18, 2008, and September 24, 2008, it was observed that erosion and sediment control measures were absent or inadequate.

- 11. Respondents proceeded with the clearing of the log jam and other clearing, excavation, and filling at the Site under the Emergency Rule, and temporarily exempted licensure requirements

under IC 14-28-1 and 312 IAC 10 in the area of the Big Blue River where these activities occurred. This Emergency Rule was intended to facilitate the reconstruction of bridge and culvert crossings damaged by floodwaters, the removal of logjams and debris from the channel of a waterway, and the stabilization and repair of stream banks eroded by floodwaters in conjunction with the clean-up and recovery efforts associated with the June 2008 flood. Respondents were not aware that the Emergency Rule did not exempt the clearing, excavation, and filling activities that Respondents engaged in at the Site, and moreover relied upon the language of the authorization letter that implied the project as proposed was compliant with IDEM requirements.

12. In recognition of the settlement reached, Respondents waive any right to administrative and judicial review of this Agreed Order.

II. ORDER

1. This Agreed Order shall be effective ("Effective Date") when it is approved by Complainant or Complainant's delegate, and has been received by Respondents. This Agreed Order shall have no force or effect until the Effective Date.
2. Respondents shall comply with 33 U.S.C. 1341 Section 401, 327 IAC 5-2-2, IC 13-18-4-5, IC 13-30-2-1, 327 IAC 2-1-6(a)(1), 327 IAC 2-1-2(1), and 327 IAC 15-5.
3. Prior to any additional mechanical clearing, excavation, and filling of waters of the United States and Waters of the State, Respondents shall apply for and receive issuance of a valid Section 401 Water Quality Certification for the project. Prior to any construction project that will disturb more than one acre, Respondent shall ensure compliance with 327 IAC 15-5.

Removal of fill from side channels? This should be included in the restoration plan.

4. Within 30 days of the Effective Date, the Respondents shall develop a detailed and effective bank stabilization plan for the Site with a schedule for its implementation, and submit it to IDEM for concurrence. The bank stabilization plan will include plans-specific details to revegetate the disturbed areas at the Site by planting the riparian corridor with native trees, shrubs, and herbaceous vegetation representative of the surrounding non-impacted areas. The plan will include such details as:

1. Vegetation: The best tree species and planting methods will depend greatly upon amount of bank erosion, stream size and planting location. Among the most successful woody vegetation for dormant cuttings are: black willow (Salix nigra), white willow (Salix alba), sandbar willow (~Salix interio~ and eastern cottonwood (Populus deltoides). Other bottomland species used for dormant cuttings include: green ash (Fraxinus pennsylvanica), eastern sycamore (Plantanus occidentalis), and box elder (Acer negundo); while these species live longer, they are more difficult to establish and are slower growing. Root hormone treatment at planting is suggested to improve their survival. Trees and shrubs available from commercial nurseries generally as barefoot stock and suitable for streamside planting include Bankers willow (Salix cottet/) and Streamco willow (Salix purpurea)' red-osier dogwood

Formatted: Numbered + Level: 1 + Numbering Style: 1, 2, 3, ... + Start at: 1 + Alignment: Left + Aligned at: 0.5" + Tab after: 0.75" + Indent at: 0.75"

Formatted: Bullets and Numbering

(Comus stolonifera), bristly locust (Robinia fertilis). Commonly used sources for cuttings are native species (like some of those listed above) taken from a nearby site similar to the proposed planting site. Suitable trees and shrubs should be marked when the leaves are on (for best identification) for cutting and planting later.

2. Post, stake and whip-sized dormant cuttings can be use for streambank erosion control. Use the larger sized cuttings for the worst bank erosion problems. To prevent moisture loss and possible washing away due to high water flow, dormant cuttings must be anchored deep in the soil from the toe of the eroding bank to the highest point where moisture is available. Start the first row one foot above the low water elevation then stagger successive rows of stakes or posts. Most sites require a minimum of three rows of stakes or posts starting just upstream of the eroded site. Whips can be planted in between or above rows of stakes and posts. For all dormant or seedling plantings, ample sunlight and root moisture are necessary for successful growth. Planting in shaded or low light areas results in poor survival rates. Biodegradable mats and staples will help to stabilize banks.
3. Specific performance standards for vegetation success such as number of herbs and percent coverage after 3 years and 5 years and number of shrubs and trees to be planted and the percent survival after 3 years and 5 years;
4. Maintenance: Vegetative plantings should be inspected frequently for disease, insect infestation, wildlife damage (i.e., beavers, deer, rabbits) and high water damage. Inspections are particularly vital during the project's initial year and following periods of severe rain and/or flooding. If stakes and posts are dislodged or removed, replanting is necessary until the bank stabilizes. Protect young trees and shrubs from wildlife, and drift applications of herbicides. Fencing and posting signs can help prevent these problems
5. Monitoring plan: standardized monitoring times and sampling within the months of May and September. Explain the method by which the two monitoring dates' data will be used to determine compliance with vegetative performance standards. On ground cover, combine and average the data on an annual basis; on tree survival, a one time per year count is appropriate and the month of May provides the best sight conditions. Annual monitoring reports should be submitted no later than November 1 of each year, with the submittal of the first report no later than November 1, 2010.

1.

Upon concurrence, Respondents shall implement the bank stabilization plan in accordance with its schedule, and any other erosion and sediment control measures necessary to stabilize the Site. During implementation, it may be necessary for the Respondents to modify operations and select alternative erosion and sediment control measures due to unforeseen issues.

Respondents will be deemed to have satisfied the requirements of this paragraph when IDEM verifies that Respondents have completed the measures in the bank stabilization plan, agreed upon performance standards have been achieved, -and the Site is deemed by IDEM to be adequately stabilized and revegetated.

5. Unless otherwise notified, Respondents shall submit the bank stabilization plan to:

James Robb, Chief
Wetlands and Stormwater Section

Formatted: Font: (Default) Times New Roman, 12 pt

Formatted: Font: (Default) Times New Roman, 12 pt

Formatted: Font: (Default) Times New Roman, 12 pt

Formatted: Numbered + Level: 1 + Numbering Style: 1, 2, 3, ... + Start at: 1 + Alignment: Left + Aligned at: 0.5" + Tab after: 0.75" + Indent at: 0.75"

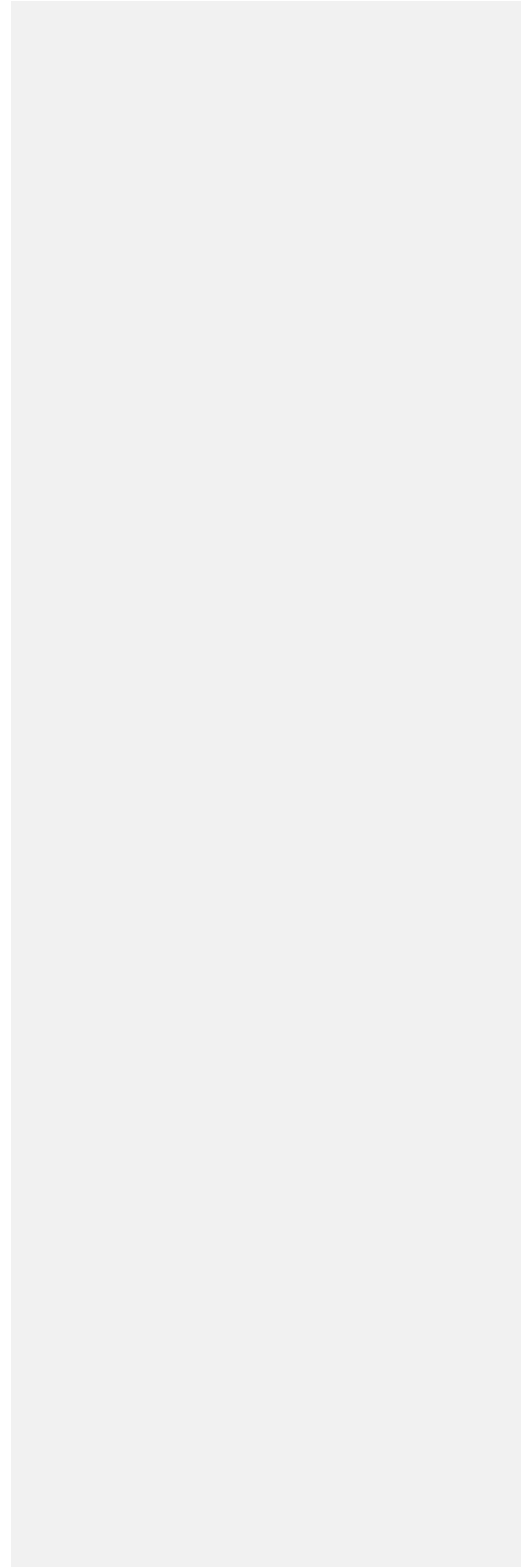
Formatted: Font: (Default) Times New Roman, 12 pt

Formatted: Font: (Default) Times New Roman, 12 pt

Formatted: Indent: Left: 0.25"

IDEM, Office of Water Quality – Mail Code 65-42 WQS
100 N. Senate Avenue
Indianapolis, IN 46204-2251

6. This Agreed Order shall apply to and be binding upon Respondents and their successors and assigns. Respondents' signatories to this Agreed Order certify that they are fully authorized to execute this Agreed Order and legally bind the party they represent. No change in ownership, corporate, or partnership status of Respondents shall in any way alter their status or responsibilities under this Agreed Order.
7. In the event that any terms of this Agreed Order are found to be invalid, the remaining terms shall remain in full force and effect and shall be construed and enforced as if this Agreed Order did not contain the invalid terms.
8. The Respondents shall provide a copy of this Agreed Order, if in force, to any subsequent owners or successors before ownership rights are transferred. Respondents shall ensure that all contractors, firms and other persons performing work under this Agreed Order comply with the terms of this Agreed Order.
9. This Agreed Order is not and shall not be interpreted to be a permit or a modification of an existing permit. This Agreed Order, and IDEM's review or approval of any submittal made by Respondents pursuant to this Agreed Order, shall not in any way relieve Respondents of their obligation to comply with the requirements of its applicable permits or any applicable Federal or State law or regulation.
10. Complainant does not, by its approval of this Agreed Order, warrant or aver in any manner that Respondents' compliance with any aspect of this Agreed Order will result in compliance with the provisions of any permit, order, or any applicable Federal or State law or regulation. Additionally, IDEM or anyone acting on its behalf shall not be held liable for any costs or penalties Respondents may incur as a result of Respondents' efforts to comply with this Agreed Order.
11. Nothing in this Agreed Order shall prevent or limit IDEM's rights to obtain penalties or injunctive relief under any applicable Federal or State law or regulation, except that IDEM may not, and hereby waives its right to, seek additional civil penalties for the same violations specified in the Findings of Fact of this Agreed Order.
12. Nothing in this Agreed Order shall prevent IDEM [or anyone acting on its behalf] from communicating with the EPA or any other agency or entity about any matters relating to this enforcement action. IDEM or anyone acting on its behalf shall not be held liable for any costs or penalties Respondents may incur as a result of such communications with the EPA or any other agency or entity.
13. This Agreed Order shall remain in effect until Respondents have complied with all terms and conditions of Order Paragraphs 3 through 5 of this Agreed Order and IDEM issues a Resolution of Case letter.



TECHNICAL RECOMMENDATION:
Department of Environmental Management

By: _____
Mark W. Stanifer, Chief
Water Enforcement Section
Office of Water Quality

Date: _____

COUNSEL FOR COMPLAINANT:
For the Department of Environmental
Management

By: _____
Deputy Attorney General

Date: _____

RESPONDENT:
Shelby County Commissioners

By: _____

Printed: _____

Title: _____

Date: _____

COUNSEL FOR RESPONDENT:

By: _____

Printed: _____

Title: _____

Date: _____

APPROVED AND ADOPTED BY THE INDIANA DEPARTMENT OF ENVIRONMENTAL
MANAGEMENT THIS _____ DAY OF _____, 2009

For the Commissioner:

Bruno Pigott
Assistant Commissioner
Office of Water Quality